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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Denise Dehning,

Petitioner,

v.

Child Development Services
of Fremont County, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The facts of this extraordinary case have become increasingly complex as it has passed through various forums, because the facts have been consistently, astonishingly unread or flagrantly ignored by the agencies and courts so far involved. Dehning presented the initial facts in long, narrow-margined, single-spaced documents that were clearly unread by the Wyoming Fair Employment Protection Agency (WFEPA) or the Equal Employment Opportunity Commission (EEOC), strengthening and encouraging the forging of new links in the chain of illegal and unethical acts that had caused her to seek protection in the first place.

Dehning, an otherwise ordinary citizen, is remarkable in some ways. She is doggedly willing to persist to her last breath to obtain justice; she is a self-starting, independent researcher who has continuously apprised herself of the laws pertaining to her case; and she is a thorough, scrupulous documenter. Her four-year log of this case memorializes every phone call, conversation, postal receipt, letter, and pleading. Her faith in the United States judiciary shattered by her experience, she turns to this august body in the interests of completing the record and exhausting her judicial remedies, before turning to other forums. Her story is amazing, calling to mind such popular movies as *Erin Brockovich* and *North Country*, and though she has not yet contacted the media or the film industry, public interest is certain to be aroused by her treatment and her perseverance.

QUESTIONS PRESENTED

1. Whether the Tenth Circuit violated plaintiff's constitutional right to due process;

2. Whether the Tenth Circuit erred in affirming a decision of a District Court clearly conflicting with contract law established in all jurisdictions.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit included:

Denise Dehning,
Petitioner,

and

Child Development Services of Fremont County;
Scott Carlson;
Al McClelland;
Sandra Mossbrook;
Craig Tolman;
Laura Caniglio;
Karl Florence;
Jerry Nelson;
Pat Powell;
Cheri Copeland,
Respondents.

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OPINIONS BELOW

This case originated in the United States District Court for the District of Wyoming, case number 05-CV-249-CAB. Petitioner was never provided a filed copy of the order. The District Court filed no findings of fact or conclusions of law. The United States Court of Appeals for the Tenth Circuit issued its unsigned, unpublished opinion and order in this case on January 11, 2008. Petitioner, proceeding pro se, was not served notice that the case had been decided nor sent a copy of the opinion. Petitioner had to access the opinion from the Tenth Circuit's website. A copy of that opinion is attached hereto as Appendix A. On February 8, 2008 the Tenth Circuit issued its order denying the Petition for Panel Rehearing. A copy of that order is attached hereto as Appendix B.

JURISDICTION

This matter comes to the Honorable United States Supreme Court for review pursuant to 28 U.S.C. § 1254(1) as on appeal directly from a ruling of the United States Court of Appeals for the Tenth Circuit that was decided on February 8, 2008. This petition is filed within 90 days of that date in accordance with USCS Supreme Court Rule 13.1. Notice was served pursuant to USCS Supreme Court Rule 29.

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES OF THE COURT INVOLVED

A. Federal Constitutional Provision

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law."

B. Statutory Provisions

Title 28, Appendix of the United States Code - Federal Rules of Appellate Procedure provides, in relevant part:

> Rule 36. Entry of Judgment; Notice
> (b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion – or the judgment, if no opinion was written - and a notice of the date when the judgment was entered.
>
> Rule 41. Mandate
> (b) When Issued. The Court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Rule 41. Mandate
(d) Staying the Mandate.
(2)(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court.

Title 28, Appendix of the United States Code - Federal Rules of Civil Procedure provides, in relevant part:

Rule 52. Findings by the Court.
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon.

Title 42, Section 2000e-5 [Title VII § 706(b)] of the United States Code provides, in relevant part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, ... the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, ... within ten days, and shall make an investigation thereof.

Wyoming Statutes Annotated § 1-23-105(a)(i), Statute of Frauds, provides:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith:

> Every agreement that by its terms is not to be performed within one (1) year from the making thereof;

C. Rules of the Court

Local Rule 40.1(A) of the United States Court of Appeals for the Tenth Circuit provides:

> A petition for rehearing should not be file routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.

STATEMENT OF THE CASE

In June of 2004, Dehning, a physical therapist for babies and toddlers employed by Child Development Services of Fremont County (CDS) turned to the Wyoming Fair Employment Protection Agency (WFEPA) because of adverse employment actions following her report of sexual harassment by her supervisor. To the WFEPA Intake Questionnaire, Dehning attached a 10-page Supplemental Information document, which notes in its first sentence that she had two charges, and devotes nine pages to the retaliatory acts that eventually culminated in her constructive discharge and one page to harassment.

Though Dehning's in-house harassment grievance had not (to this day) been determined by CDS, the WFEPA managed to overlook the fact that it had no jurisdiction over the harassment issue and mysteriously and incompetently issued

only a harassment charge, ignoring retaliation, the thrust of Dehning's complaint and the reason she filed it.

When Dehning called the WFEPA to protest, she was told that the charge had been sent to the EEOC and was assured that the EEOC would "investigate thoroughly" and "look at everything."

The EEOC, however, did neither, violating federal law and its own policy while it had the case. The EEOC did not serve the charge on defendants within the ten days required by 42 U.S.C. § 2000e-5 [Title VII §706(b)], but only after more than a month and three phone messages from Dehning reporting that she had now lost her job. Further, the EEOC ignored Dehning's calls for two weeks, in violation of its written policy requiring it to respond to complainant phone calls within two business days.

In the meantime, relying on the EEOC's obligation to serve her charge within ten days and unaware that it had not, Dehning waited ten days to reapply for her job, expecting that CDS' actions would be influenced by its knowledge that a watchdog agency was involved. CDS, unaware that the EEOC was involved, did not rehire Dehning, instead hiring multiple personnel to cover her caseload.

The EEOC investigator, hopefully atypical of EEOC investigators, far from curing the WFEPA error, also missed the fact that the EEOC had no jurisdiction over the question of harassment and treated the case exclusively as a harassment case. The investigator contacted Dehning only once, focused solely on harassment, rudely interrupted

Dehning and would not let her speak when Dehning tried to raise retaliation – the reason she had filed the charge – and clearly demonstrated, as per Dehning's notes on the conversation, an ignorance that retaliation was at issue.

Following CDS' refusal to rehire her, Dehning turned to the WFEPA again, complaining of retaliatory failure to rehire. Again, her complaint was referred to the EEOC, which had yet taken no action on the first charge. When Dehning's phone calls were not returned, she contacted Wyoming's US Congresswoman, Barbara Cubin, who wrote to the EEOC on Dehning's behalf, and then, over the course of several weeks, wrote again, and again. The day the EEOC received Cubin's third letter, the EEOC investigator herself retaliated, calling Dehning to report that she, having never investigated Dehning's complaint of retaliation, was recommending dismissal, based, again as per Dehning's notes, on the fact that "the harassment stopped" – as if this were the standard for a finding of harassment, even had the EEOC had jurisdiction.

The EEOC supervisor reviewing the recommendation of dismissal also interrupted Dehning and would not let her speak when she tried to raise the retaliation issue and also recommended dismissal "because the harassment stopped." Dehning appealed the dismissal. The EEOC affirmed the dismissal.

Dehning contacted 18 attorneys, none of whom was willing to take what erroneously appeared to be a harassment case already dismissed by the EEOC. Her window to litigate the charge closed.

Dehning was aware, however, that EEOC cases can be reopened. She accepted that she could not litigate the facts of the retaliation leading to her constructive job discharge, but intended – and intends – to force a reopening of the case. (Despite letters from Wyoming's U.S. Senators Enzi and Craig, Cubin, and Vice President Cheney, the EEOC has refused to respond to the questions of why the EEOC refused to address Dehning's complaint of retaliation in her first charge and why a 17-page document Dehning filed appears to be missing from the EEOC file.)

The EEOC issued a Right to Sue letter on Dehning's second charge, retaliatory refusal to rehire. Dehning retained Riverton attorney Donald Rissler, whose incompetent representation is reflected in the record. Mr. Rissler has since died, at age 49, shortly after his provable perjury in the federal district court.

On Mr. Rissler's advice, Dehning mediated. The mediation was not recorded in any way. CDS offered Dehning her job back. Because Dehning refused to be supervised by her former supervisor or the CDS director, the parties agreed that Dehning would return to work as an independent contractor. By CDS' own admission, the purpose of the independent employment contract was to obviate such supervision. At the end of the mediation, the mediator directed the parties to reduce the agreement to writing.

The settlement documents were unsatisfactory for various reasons. Rissler's Release (he had not advised Dehning that she would be releasing the prior claim she was independently pursuing)

included prospective claims and made no mention of the independent employment contract.

More importantly, the independent employment contract prepared by CDS did not conform to the settlement agreement in three critical aspects. The contract actually called for increased supervision by Dehning's former supervisor and the CDS director, gave CDS control over Dehning's hours, and severely limited her scope of practice, all in violation of the agreement. CDS had unilaterally modified the contract. The minds of the parties had clearly not met.

When Dehning refused to sign the settlement documents, Rissler falsely imprisoned her, initially saying, "You cannot leave this office until you have signed these documents!" He then agreed that the independent employment contract was nonconforming and said he would have CDS cure the contract.

Thereafter Rissler sent Dehning a new CDS-prepared contract. The contract cured none of the defects and in fact added a new sentence reinforcing one of the defects. The contract on its face does not conform to the mediator's Settlement Letter.

Rissler moved to withdraw, advising Dehning that a hearing would be necessary. CDS moved to enforce the settlement agreement. Dehning waited for the hearing on the motion to withdraw. Nine weeks later Judge Clarence Brimmer granted the motion to withdraw without hearing. Dehning immediately consulted Lander attorney Aparna Durbin, who sent CDS a settlement offer on Dehning's behalf. CDS rejected the offer.

Durbin was unable to further represent Dehning, who then retained Lander attorney Donna Courtney, unaware that Courtney was disabled by alcoholism. Courtney has since been placed on disability inactive status by the Wyoming Supreme Court.

Courtney, after missing pleadings deadlines, eventually hired a legal writer to brief the issues, prepare an affidavit, and move to dismiss, then made herself unavailable to Dehning or the writer. The day the pleadings were due, Courtney signed the pleadings without reading them, and Dehning drove the ten-hour round trip from Lander to Cheyenne and filed them.

Dehning arrived at the hearing on the Motion to Enforce Settlement expecting an arguments hearing. The record shows that CDS gave no notice that it was producing witnesses. (The Tenth Circuit later observed that Dehning's version of the facts at the hearing was supported by no witnesses on her behalf when in fact she had no opportunity to present witnesses.)

Courtney did not object that the hearing had turned suddenly without notice into an evidentiary hearing. Thus ambushed, Dehning was nevertheless able to introduce the contract variances into the record, which variances alone make the settlement agreement unenforceable.

The Good Old Boys network has made a strong showing in this case since Dehning's complaint to the CDS director of harassment. The hearing transcript shows that Judge Brimmer, stroke-impaired and hearing-impaired, came to the hearing unacquainted with the facts or the law,

unable to understand either, and strongly predisposed in favor of the white males opposing Dehning and her counsel. Dehning has since filed a complaint of Judicial Disability against Judge Brimmer, decided by the Tenth Circuit in favor of Judge Brimmer. Her appeal is pending.

At the conclusion of the tragicomic hearing he conducted, Judge Brimmer found for CDS – except for Dehning's employment, which he found she had waived – and imposed punitive costs against Dehning, stating that Dehning, whose pursuit of her case was on the advice of two lawyers, had "arbitrarily and willfully refused to carry out her grievance."

Following the hearing, Courtney manifested a series of bizarre behaviors, including instructing Dehning to write her own pleadings for Courtney's signature and failing to advise Dehning of subsequent events in her case or provide her with case documents. Dehning has proceeded in the case pro se (but not in forma pauperis) since January, 2007.

Dehning appealed to the Tenth Circuit, which decided her case on January 11, 2008. In violation of the United States Code, the Federal Rules of Appellate Procedure (FRAP), and the United States Constitution, the Tenth Circuit did not send notice or a copy of the opinion to Dehning, but only to opposing counsel. FRAP 36(b).

Dehning learned of the opinion by calling the Tenth Circuit to ask the status of her case. She therefore learned of the decision, through her own diligence, three days before the deadline for filing a petition for panel rehearing. Though she should

not have had to move for an extension of time to petition for a panel rehearing, she was forced to do so. The Court delayed its ruling on her request, ultimately granting her three business days to file the petition!

Dehning mailed her Petition for Panel Rehearing three business days later, having been advised by a member of the Tenth Circuit staff that the mailing date was the filing date. The morning of the day the petition reached the Court, the Court issued its Mandate. The next early morning, the petition was denied.

Dehning called the Tenth Circuit and after the usual runaround, spoke to the Clerk's counsel, who looked into the matter and called Dehning back to say the petition was filed late, that according to the rules, it was due on the date it was mailed. Presumably, the Tenth Circuit was allowed to break the rules, but Dehning wasn't.

Because the petition for rehearing had been denied within a few hours of its receipt, leading Dehning to believe that the Court did not read it; and because her information was that the petition was deemed late; and because the petition shows that the settlement agreement was unenforceable, Dehning filed a Motion to Consider Petition for Panel Rehearing.

The Tenth Circuit, construing this motion as a Motion to Recall Mandate, declared that Dehning's petition for rehearing had in fact been timely filed and had been carefully considered and denied on its merits. No mention of the Mandate appears in the Court's order.

Dehning was not allowed to move to stay the Mandate, solely due to the illegal acts of the Tenth Circuit, beginning with its failure to give her notice that it had decided her case, causing grievous harm in that Defendants have distributed the monies.

Dehning's rights had again been violated, this time by a body charged with protecting her rights. The case now seemed to be in a hopeless snarl. Believing that the tangle could only be corrected by starting over, Dehning filed a Motion to Enter Judgment in Accordance with FRAP and the United States Constitution, which motion the Court refused to entertain.

It is worth noting that Tenth Circuit Chief Deputy Clerk Douglas Cressler took an adversarial stance with Dehning from their first contact, saying, among other things, when Dehning protested that the Court couldn't possibly have carefully read and considered her petition for rehearing in the given time frame that it didn't matter if the Court looked at the petition for only one second. Cressler further refused to provide Dehning with a timeline of the events in her case, first stating falsely that he didn't know if a timeline existed.

The Mandate was issued on February 7, 2008. Six and a half weeks later, on March 25, Dehning received electronic notice that the Mandate was issued as of that date. The next day she received notice that the new Mandate was a clerical error. Eight minutes later, she received a third notice, indicating that the Mandate was in fact reissued on March 25.

REASONS FOR GRANTING THE WRIT

1. Plaintiff's constitutional rights to due process have been violated by a body designed to protect such rights.

The United States Constitution requires that all persons be afforded due process under the laws. The judicial arm of government was established to protect these rights. It is thus particularly heinous when a court violates these rights.

The Tenth Circuit failed to afford plaintiff due process, in violation of the United States Constitution and numerous provisions of the 28 U.S.C. Appendix (Federal Rules of Appellate Procedure).

The Tenth Circuit's first violation of the Constitution and the FRAP was in its failure to give Dehning notice that it had decided her case or to provide her a copy of the opinion. FRAP 36(b). Dehning had been proceeding pro se (though not in forma pauperis) for more than a year and had received other communications from the Tenth Circuit. Eleven days after the opinion was filed, Dehning happened to call the Tenth Circuit to inquire the status of her appeal, so learned of the decision through her own diligence.

In keeping with her experience throughout her case, Dehning was falsely advised by two Tenth Circuit staff members that notice and a copy of the opinion had been mailed to her. The Notice of

Docket Activity, however, reflects that notice was given only to defendants.

Dehning was thus forced to request an extension of time for a petition for panel rehearing, which she should certainly not have had to do. The Tenth Circuit delayed its ruling on her request, finally granting her three business days to file such petition. A Tenth Circuit staff member incorrectly advised her that the postmark date was the filing date. Dehning mailed her Petition for Panel Rehearing on the third business day following the granting of her motion, clear evidence that had she been given the legally required notice, her Petition for Panel Rehearing would have been filed within the 14 days mandated by FRAP 40(a)(1).

The morning of the day Dehning's Petition for Panel Rehearing reached the Court, February 7, 2008, the Court issued its mandate.

The next morning, February 8, at 8:08 a.m., her petition was denied.

Dehning's subsequent calls to the Tenth Circuit yielded the information that her petition for rehearing had not been timely filed. Fully aware that the District Court had radically departed from established principles of contract law by enforcing the settlement agreement at issue and that the Tenth Circuit had overlooked or misconstrued numerous significant issues in affirming the District Court – all illuminated in her petition for rehearing – Dehning moved the Court to consider her petition for rehearing.

The Tenth Circuit, construing Dehning's motion as a Motion to Recall Mandate, responded by asserting that it had considered her petition for

rehearing as timely and had considered it carefully, thus asking Dehning to believe that all the judges of the panel had carefully reviewed her 20-page petition in the space of a few hours at most and denied it on its merits, despite its several incontrovertible arguments concerning the District Court's failure to apply proper law and the Tenth Circuit's overlookings and misconstructions of significant issues in the case.

Having renamed Dehning's motion to consider her petition for rehearing, denominating it a Motion to Recall Mandate, the Tenth Circuit denied the motion, but without mentioning the mandate, leaving Dehning unclear about the Court's exact ruling.

Presumably, the Court was refusing to recall the mandate. But the Tenth Circuit had given her no opportunity to stay the mandate, in violation of FRAP 41(b), and causing Dehning grievous harm in that Defendants have since distributed the monies.

For four years Dehning had been battling illegal, unethical, unjust and/or incompetent acts, from defendant CDS to the WFEPA to the EEOC to the two lawyers she retained to the federal district court, and now the federal appellate court. Her appeal seemed in a hopeless snarl, entirely due to the Tenth Circuit's initial misfeasance, which it continued to compound.

Hoping to secure the legal rights afforded to every appellant, Dehning filed a Motion to Enter Judgment in Accordance with the United States Constitution and the Federal Rules of Appellate Procedure. In reply, she received a letter from Chief Deputy Clerk Douglas Cressler, advising that

the Court would not entertain the motion. Cressler has been antagonistic to Dehning since their first encounter. Their conversations have included such remarks by him as, "It doesn't matter if the judges only looked at your petition for rehearing for only one second," and "Back where I come from, there is a saying that a pancake is so flat it always has two sides."

On March 25, six weeks after the Court had issued its mandate, Dehning received electronic notice that the mandate was issued as of March 25. The next day she received notice that the mandate had been issued on February 7, and the March 25 mandate was an error. Eight minutes later, she received notice that the mandate had in fact been issued on March 25.

2. The decision below radically departs from well-established principles of contract law.

Certain principles of contract law are established in all jurisdictions. The minds of the parties must meet. Brockman v. Sweetwater County School District, 25 F.3d 1055 (10th Cir. 1994); Wyoming Sawmills v. Morris, 756 P.2d 774 (Wyo. 1988) An oral contract intended to be reduced to writing is incomplete until the contract is written and signed. Wyoming Sawmills v. Morris, supra. A unilateral mistake is not grounds for avoidance of a contract unless the mistake was produced by the conduct of the other party. Givens v. Fowler, 984 P.2d 1092, 1096 (Wyo. 1999). A contract may not be unilaterally modified in the

absence of additional consideration. Harvard v. Anderson, 524 P.2d 880, 883 (Wyo. 1974); Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211 (Wyo. 1994); Brodie v. General Chemical Corp., 934 P.2d 1263 (Wyo. 1997); Brodie v. General Chemical Corp., 112 F.3d 440 (10th Cir. 1997); McIlravey v. Kerr-McGee Corp., 119 F.3d 876 (10th Cir. 1997).

The record herein fairly shouts that the minds of the parties did not meet, that the oral agreement was intended to be reduced to writing, that CDS, not Dehning, was mistaken in its interpretation of the agreement, i.e., the terms of the independent employment contract, and that CDS in fact unilaterally modified the employment contract without notice or additional consideration.

The Tenth Circuit overlooked or misconstrued a shocking number of points of law and fact, proving its unfamiliarity with the facts and law of the case. Dehning now addresses these errors in the order of their appearance in the opinion.

The Tenth Circuit characterized Dehning's first charge as a sexual harassment charge. Thousands of words have been spent on this case debating whether sexual harassment was an issue at litigation, a question that only arose because of the misfeasance of the WFEPA and the EEOC in interpreting Dehning's first complaint as a sexual harassment complaint, when the 10-page Supplemental Information document she filed with her completed WFEPA Intake Questionnaire shows beyond question that her complaint was inspired by adverse employment actions following her report of harassment. Plaintiff's efforts to clarify this point

were interrupted, cut short, and unheard by both EEOC personnel who handled the case.

[Note: Dehning's theory about why the EEOC decided as it did and has subsequently ignored the questions of all Wyoming's United States congresspeople and Vice President Cheney's office, is that it intended to issue a Right to Sue letter on the subsequent retaliatory failure to rehire, which it did, and refused to address the retaliation of the first charge to cover up its failure to serve notice of the first charge within the 10 days required by 42 U.S.C. § 20000e-5 [Title VII § 706(b)]. This failure had grave consequences, as CDS would surely have rehired Dehning had it known she had complained to a protective agency. By pretending that retaliation did not occur until the time of the second charge, the EEOC appears to be hoping to sweep the initial retaliation under the rug.]

In any event, sexual harassment was not an issue in this case. Apart from the facts that CDS to this day retains jurisdiction over the question of harassment, having never decided Dehning's in-house harassment grievance, and that the Complaint alleges retaliation and not harassment, the issue in this case is the nonconforming independent employment contract.

Again, the Tenth Circuit's opinion states that Dehning "refused to sign the employment agreement because she did not like the language, although she refused to suggest any changes." The record clearly contradicts this. The record contains a letter from Rissler, Dehning's first counsel, indicating that he was enclosing a new copy of the contract, revised in accordance with her demands.

(The revised contract, in the record, shows on its face that the defects were not cured, but that one defect was in fact reinforced by additional redundant language.) The record also contains a letter on Dehning's behalf from Lander attorney Aparna Durbin, suggesting changes to the contract to bring it into line with the agreement, which suggestions were refused by CDS.

The Tenth Circuit states: "At the enforcement hearing, the mediator testified that the confidential mediation statement received from Ms. Dehning's original lawyer described her claim as including both sexual harassment and unlawful retaliation and 'we discussed the issues during the entire day.'" Again, apart from the facts that (1) Dehning was not allowed to meet with Rissler to discuss the mediation statement, (2) Dehning assumed the discussion of harassment in the statement was to show that her retaliation claim was based on harassment rather than some other reason, (3) the Complaint did not allege harassment, and (4) Dehning was precluded from litigating harassment because her litigation window had closed, sexual harassment was simply not, and could not have been at issue. Jurisdiction over the question of harassment lay elsewhere, with CDS, which never determined her harassment grievance.

The Tenth Circuit devoted paragraphs to Dehning's claim that she was not advised, either by her counsel, or by the mediator, that in settling, she would be releasing the prior claim that she was independently pursuing, and cited Givens v. Fowler, 984 P.2d 1092, 1096 (Wyo. 1999) as support

for its conclusion that this mistake was unilateral and not caused by CDS' conduct.

What's wrong is wrong. Before mediating, Dehning required a letter from Rissler, detailing exactly what she would be committing to by mediating. Rissler, perjuring himself, testified that this letter advised Dehning she would be releasing all claims. The letter, in the record, makes no mention of a release. Mediator Vlastos testified that in directing Rissler to prepare a release, he was referring to the usual and standard release of all claims. He did not, however, otherwise describe or explain the release, which Dehning reasonably assumed would be a release of the underlying litigation. In any event, the release (which included prospective claims and made no mention of the employment contract) is moot. The settlement agreement was unenforceable because the independent employment contract, an essential term of the settlement, did not conform to the agreement, in either its original or revised forms.

The Tenth Circuit stated that Dehning refused to sign the independent employment contract because she disagreed with "some of the language." The language Dehning disagreed with changed the terms of the settlement agreement substantively. Dehning's efforts, through two attorneys, to force a conforming contract, were unsuccessful.

The Tenth Circuit stated that CDS' (former) director "testified he understood Ms. Dehning was settling all of her claims, including harassment and had to hire a replacement when Ms. Dehning refused to sign the employment agreement." First, the former CDS director's understanding of the

settlement is irrelevant. Second, his need to hire a replacement was CDS' fault, not Dehning's. Dehning wanted to go back to work and tried through two attorneys to force CDS to write an employment contract that would conform to the agreement. The CDS letter to Aparna Durbin, in the record, shows that the minds of the parties had not met and that CDS had committed a unilateral mistake, not caused by Dehning's conduct.

The Tenth Circuit stated that the district court "has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." This is true, but only if the settlement agreement is enforceable. The settlement agreement here was unenforceable.

The Tenth Circuit stated the standard for review as abuse of discretion and stated: "An abuse of discretion occurs when the Court's decision is based on an erroneous conclusion of law or a clearly erroneous factual finding." Judge Brimmer filed no Findings or Conclusions. The basis for his decision must be found in the transcript, which is gorged with evidence of partiality and mental incompetence, and includes a number of instances where he simply refused to hear plaintiff's evidence and argument on matters central to the controversy.

Judge Brimmer cited Brockman v Sweetwater, supra, as legal support for his decision to enforce the agreement:

> Under the authority of Brockman versus Sweetwater County School District, which was a published case in 826 Fed supp q328, it is held

> that where such an agreement compromise – an agreement of compromise and settlement is reached, it is a valid agreement, that saves the parties time and money, and it also saves the little resources of the Court. And for that reason it should be enforced.

Judge Brimmer had clearly not so much as leafed through the extensive record, had not read the arguments, and was unacquainted with the facts of the case, as much so at the end of the hearing as at the beginning. Brockman, decided on the sole ground that the verbatim transcript of the mediation constituted a writing, was favorable to plaintiff, whose mediation was not recorded. Judge Brimmer's one and only conclusion of law was erroneous and requires reversal.

Factually, Judge Brimmer found that Dehning "had no reasonable ground for refusing to sign the settlement papers." Although Judge Brimmer had repeatedly bullied, rushed, and interrupted both Dehning and her female counsel, Dehning had managed to introduce evidence of substantial variances between the settlement agreement and the two independent employment contracts CDS had offered. During the three minutes of closing argument Judge Brimmer allowed (he had a party to go to), Courtney referred to this evidence. Judge Brimmer said: "I don't – I don't know. ... I don't know what hearing you were [sic], but I haven't heard that." Judge Brimmer was unacquainted with the record, had refused to hear relevant evidence, had demonstrated a shocking failure to understand the case, and had entirely forgotten

evidence favorable to Dehning. The finding that Dehning had no reasonable ground for refusing to sign an employment contract that did not conform to the settlement agreement or a release that included future claims is clearly erroneous.

The Tenth Circuit, citing Givens v Fowler, supra, stated: [A] unilateral mistake is not grounds 'for avoidance of the contract ... unless the mistake was produced by the conduct of the other party.'" The Tenth Circuit was referring here to the misunderstanding about the release of Dehning's prior claim, but in fact Givens is applicable here. A unilateral mistake was made – by CDS, not Dehning. CDS' letter to attorney Durbin rejecting Dehning's settlement offer, in the record, shows clearly that CDS misunderstood the agreement, through no conduct of Dehning's.

While conceding that the purpose of the independent contract was to bypass supervision by the two men Dehning refused to be supervised by, this letter goes on to explain that Dehning would in fact be subject to greater supervision by these two men than she was as an employee. CDS had undertaken to unilaterally modify the agreement without additional consideration. Givens v. Fowler, 984 P.2d 1092, 1096 (Wyo. 1999).

The parties had always intended that the unrecorded mediation would not be final until reduced to writing – to obviate just the sort of misunderstanding that occurred. Rissler, Dehning's representative at mediation, himself testified: "[T]he agreements, meaning the contract and the settlement agreement were not completed. They were there for her review and changes could

have been made to those agreements." His further testimony that Dehning simply refused to tell him why she wouldn't sign the documents is contravened by his own letter, in the record, stating "Enclosed herein please find the revised contract with the changes you wanted" – accompanying a revised contract that did not cure the contract's defects – and also by his testimony that Dehning had objected to the release of future claims. The letter does not offer to revise the release or ask if the contract was now acceptable, but directs Dehning to come in and sign.

The Tenth Circuit stated that Dehning's testimony "was contradicted by every other witness." The record shows that Dehning was not given notice that witnesses would attend the hearing. She had expected arguments on the law, which she knew was favorable to her. She was ambushed and given no opportunity to produce witnesses of her own. Further, the record shows that much of the testimony and argument adduced against her was in conflict with the record, of which the trial judge was entirely ignorant.

The Tenth Circuit stated that courts have "inherent authority to 'assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" The record belies this. Dehning was pursuing justice, not only because she knew she was in the right, but on the advice of two attorneys.

The Tenth Circuit affirmed the district court's punitive award of attorney fees (on the basis of defense counsel's mistaken assertion that Title VII authorized his attorney fees), witness travel costs,

and $1209 for the mediator – despite the mediator's twice-repeated testimony that he was not charging for the day – stating: "Because the record supports the district court's factual finding that Ms. Dehning's litigation conduct in refusing to consummate the settlement agreement was 'arbitrary, willful, and without cause', we affirm the award of fees and costs." The district court did not file Findings of Fact and Conclusions of Law as required, but found as a fact at the hearing that Dehning had "arbitrarily and willfully refused to carry out her grievance," one of a multitude of examples of its judicial disability.

The Tenth Circuit declined to address the Statute of Frauds because the district court did not enforce the settlement agreement. The settlement agreement was unenforceable, and the Statute of Frauds does apply. An essential term of the agreement, the independent employment contract, was not performable within a year. The mediation took place in April. Dehning's one-year employment contract was to commence the following August. Wyo. Stat. Ann. § 1-23-105(a)(i).

Even if a trial court's finding is supported by substantial evidence – which in this case it was not – its presumption of correctness will be set aside if against the great weight of evidence. Shores v. Lindsey, 591 P.2d 895 (Wyo. 1979); Hopper v. All Pet Animal Clinic, 861 P.2d 531 (Wyo. 1993). See also U.S. v. Gypsum, 33 U.S. 364 (1948). The evidence the district court relied on was confined to the testimony and argument, much of which was provably incorrect and/or perjured. The district judge's finding was against the great weight of

evidence already in the record at the time of the hearing, as he would have known had he bothered to acquaint himself with the record.

Dehning's pursuit of justice was far from arbitrary, willful, and without cause. The record reflects that Dehning was advised by counsel that the settlement agreement was unenforceable. The record reflects that the release prepared by her then counsel included prospective claims and does not even mention the independent employment contract, an essential term of the agreement. The record reflects that the parties contemplated a writing to complete the agreement. The record reflects that the minds of the parties did not meet – CDS' understanding of the independent employment contract, as per its letter to Durbin, was clearly different from the terms set forth in Mediator Vlastos' settlement letter. The record reflects that CDS tricked Dehning into agreeing to an independent contract with the understanding that she would not be supervised by her former supervisor or the CDS director, when in fact as an independent contractor, she was subject to greater supervision by both. The record reflects that CDS unilaterally modified the employment contract without notice or additional consideration.

CONCLUSION

The following words appear on the United States Supreme Court website:

> "EQUAL JUSTICE UNDER LAW" – These words, written above the main entrance of the

> Supreme Court building, express the ultimate responsibility of the Supreme Court of the United States. The court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the court is charged with ensuring the American people the promise of equal justice under law, and thereby, also functions as guardian and interpreter of the constitution.

These are heartening, inspiring words. Dehning's quest for equal justice has so far been in vain. Dehning prays that this Court, the final arbiter of the law, charged with ensuring equal justice to all, review the entirety of her complex case, or in the alternative, to summarily reverse.

FILED
United States Court of Appeals - Tenth Circuit
January 11, 2008
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENISE J. DEHNING,

Plaintiff-Appellant,

v.

No. 07-8008
(D.C. No. 05CV249B)
(D. Wyo.)

CHILD DEVELOPMENT SERVICES OF FREMONT COUNTY; et. al,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before TACHA, McCONNELL, and GORSUCH, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiff Denise J. Dehning appeals from the district court's order enforcing a settlement agreement and awarding attorney fees and costs incurred in the enforcement action. We affirm.

This suit arises from Ms. Dehning's tenure as a physical therapist for Child Development Services ("CDS"), a non-profit that serves developmentally disabled children in Fremont County, Wyoming. While working at CDS, Ms. Dehning alleged that she was sexually harassed by a fellow employee. When her written grievance about that conduct was not resolved to her satisfaction, she filed a complaint with the Wyoming Fair Employment Protection Agency ("WFEPA"), which in turn referred the matter to the Equal Employment Opportunity Commission ("EEOC"). While her sexual harassment charge was under investigation, she filed a second complaint with the WFEPA in which she alleged retaliation because CDS failed to renew her contract after she complained of harassment. Ms. Dehning's retaliation complaint was likewise referred to the EEOC.

On May 31, 2005, the EEOC dismissed Ms. Dehning's sexual harassment charge and notified her that "to pursue this matter further, [she] must file a lawsuit . . . within 90 days . . . ." Aplt. App., Vol. II, Ex. 44 at 2. As to her retaliation charge, the EEOC found reasonable cause to believe her claim, and on June 24, 2005, it issued a right to sue letter. On September 24, 2005, she sued CDS, its board and executive director, and a co-worker for both sexual harassment and unlawful retaliation under Title VII. *See* 42 U.S.C. § 2000e, *et seq.*

Eventually, the parties engaged in mediation and reached an agreement in which Ms. Dehning agreed to settle her claims against the defendants in exchange for $30,000 and CDS's agreement to hire her as an independent contractor for one year beginning August 2006. Later, however, Ms. Dehning refused to follow through with the settlement, claiming she never agreed to compromise her sexual harassment claim. She also refused to sign the employment agreement because she did not like the language, although she refused to suggest any changes.

The defendants moved the district court to enforce the settlement agreement. Because Ms. Dehning's lawyer withdrew from the representation, she retained new counsel to represent her at the hearing on this motion. At the enforcement hearing, the mediator testified that the confidential mediation statement received from Ms. Dehning's original lawyer described her claims as including both sexual harassment and unlawful retaliation and "we discussed the issues during the entire day." Aplt. App., Vol. IV at 21. He further testified he "gathered the parties after the agreement had been reached and went through each of the terms in the presence and with the parties there. And each consented and indicated that this is the agreement that we had." *Id.* at 26. The next day, the mediator reduced to writing the terms of the agreement. Among other things, he confirmed that in exchange for $30,000, Ms. Dehning's lawyer would prepare a "release [of] all claims, known or unknown," against the defendants, *id.*, Vol. III, Ex. 1 at 1, and the

defendants' lawyer would prepare a written agreement for CDS to hire her as an independent contractor. CDS also agreed to sexual harassment training and to review and update its policies.

Donald Rissler, Ms. Dehning's first lawyer, testified that the parties' settlement agreement included both her retaliation and sexual harassment claims – the agreement "encompassed all of it. It was a global settlement and I believe everyone understood that." *Id.*, Vol. IV at 61. During the mediation, Ms. Dehning showed him a book on sexual harassment and "recited to me and pointed out to me several sections in the book that had to do with sexual harassment law and the rule of damages. So she was fully aware of what was going on during our discussions." *Id.*

For her part, Ms. Dehning testified she tried to avoid the settlement agreement because "it was never explained to [her] what the release document [was] before the mediation conference or at the mediation conference." *Id.* at 52. She acknowledged the existence of an oral agreement to hire her as an independent contractor, but refused to sign the contract because of her disagreement with some of the language. The executive director of CDS testified he understood Ms. Dehning was settling all of her claims, including sexual harassment, and had to hire a replacement when Ms. Dehning refused to sign the employment agreement.

Following the enforcement hearing, the district court entered a written order on December 11, 2006, dismissing the case with prejudice and enforcing the settlement agreement, with the exception of the employment agreement because

Ms. Dehning's refusal to finalize the employment agreement "constituted a waiver of her right to such agreement." *Id.*, Vol. 1, Doc. 43 at 3. The court also found her "refusal to abide by the terms of the settlement agreement was arbitrary, willful, and without cause," *id.*, and ordered her to pay the defendants' attorney fees and the mediator's costs to attend the hearing.

On December 19, 2006, the district court granted Ms. Dehning's motion for a stay pending appeal. The same day, the court also granted the defendants' motion for Ms. Dehning to post a bond during the pendency of her appeal. The court later denied her motion to extend the deadline for filing an appeal, and on February 5, 2007, Ms. Dehning filed her notice of appeal *pro se*.

Before us, the defendants argue first that Ms. Dehning's appeal from the orders dated December 11 and 19, 2006, should be dismissed because her notice of appeal was untimely. We disagree. Admittedly, the notice was required to "be filed . . . within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). The district court, however, failed to prepare the separate document required by Rule 58(a) of the Federal Rules of Civil Procedure for entry of the orders; therefore, judgment did not enter for purposes of filing the notice until "150 days . . . from the entry [of the December 11 and 19 orders] in the civil docket." Fed. R. Civ. P. 58(c)(2)(B). Thus, the February 5, 2007 notice of appeal was timely.

In reviewing Ms. Dehning's appeal on the merits, we are mindful that she is proceeding *pro se*

and, accordingly, her papers are due a solicitous construction. *See Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007); *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007). We are equally mindful, however, that under our precedents the district court "has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004) (citation omitted). And we may review the decision to enforce such an agreement only "for an abuse of discretion." *Id.* An abuse of discretion occurs when the court's decision is based on an erroneous conclusion of law or a clearly erroneous factual finding. *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

The central question before us – whether a binding contract existed between the parties – is a question of fact, and thus subject to reversal only in the presence of a clear error by the district court. See *Parkhurst v. Boykin*, 94 P.3d 450, 459 (Wyo. 2004) ("[w]hether a contract exists, its terms and conditions and the intent of the parties generally are questions of fact to be resolved by the fact-finder"). The basic elements of a contract in Wyoming are the traditional ones: "offer, acceptance, and consideration. . . . When these elements have been established, courts conclude that there has been a meeting of the minds and an enforceable contract exists." *Frost Constr. Co. v. Lobo*, Inc., 951 P.2d 390, 394 (Wyo. 1998) (internal citation and quotation marks omitted). More to the point, a unilateral mistake is not grounds "for avoidance of the contract . . . unless the mistake

was produced by the conduct of the other party." *Givens v. Fowler*, 984 P.2d 1092, 1096 (Wyo. 1999).

Ms. Dehning admits that she agreed to the settlement agreement, but claims she misunderstood it. To her mind, it encompassed only her retaliation claim and did not include a compromise of her sexual harassment claim. There is, however, no evidence the defendants were responsible for her mistake concerning the scope of the claims included in the agreement. Further, the district court's findings that Ms. Dehning's position was unrealistic[,]" Aplt. App., Vol. IV at 97, and that the parties reached a contract is supported by the evidence. In addition to the fact Ms. Dehning's testimony was contradicted by every other witness, it was also belied by her mediation statement, which stated, "[t]his is a sexual harassment and retaliation case[,]" *Id.*, Vol. III, Ex. 9 at 1, and the parties' settlement agreement, which required CDS to provide training and update its policies on sexual harassment.

Ms. Dehning separately argues the employment agreement portion of the settlement violated the statute of frauds because it was not in writing. This argument is, however, irrelevant in light of the district court's conclusion that "the independent contractor agreement has been waived[.]" *Id.*, Vol. IV at 98. Because the district court did not enforce the employment agreement, we do not address whether the statute of frauds applies. See *Orr v. City of Albuquerque*, 417 F.3d 1144, 1154 (10th Cir. 2005) (holding we will not decide issues that do not affect the outcome of a dispute).

Lastly, Ms. Dehning claims the district court's authority to assess attorney fees and costs is limited to those instances where the underlying suit is frivolous, unreasonable, or without foundation. Yet this argument ignores the court's inherent authority to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citation and external quotations omitted); see also *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1317 (10th Cir. 2000) (holding that "federal courts have . . . inherent power to sanction parties for bad faith conduct *in litigation*"). Because the record supports the district court's factual finding that Ms. Dehning's litigation conduct in refusing to consummate the settlement agreement was "arbitrary, willful, and without cause," Aplt. App., Vol. III, Doc. 43 at 3, we affirm the award of fees and costs.

For the foregoing reasons, the defendants' motions to dismiss are denied, and the district court's judgment is affirmed.

Entered for the Court

PER CURIAM

FILED
United States Court of Appeals - Tenth Circuit
February 8, 2008
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENISE J. DEHNING,

Plaintiff-Appellant,

v. No. 07-8008

CHILD DEVELOPMENT
SERVICES OF
FREMONT COUNTY; et. al,

Defendants-Appellees.

ORDER

Before TACHA, McCONNELL, and GORSUCH,
Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk